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No. (28)

11-28-2006

In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, and EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections, New York County Democratic Committee, New York Republican State Committee, Associations of New York State Supreme Court Justices in the City and State of New York, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association, ELIOT SPITZER, Attorney General of the State of New York,

Petitioners,

v.

MARGARITA LOPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, Common Cause/NY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Honorable David Demarest, J.S.C.

QUESTIONS PRESENTED

1. In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court held that it is "too plain for argument" that a State may require intraparty competition to be resolved either by convention *or* primary. Did the Second Circuit run afoul of *White* by mandating a primary in lieu of a party convention for the nomination of candidates for New York State trial judge?

2. What is the appropriate scope of First Amendment rights of voters and candidates within the arena of intraparty competition, and particularly where the State has chosen a party convention instead of a primary as the nominating process?

   (a) Did the Second Circuit err, as a threshold matter, in applying this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974) and related ballot access cases, which were concerned with the dangers of "freezing out" minor party and non-party candidates, to internal party contests?

   (b) If *Storer* does apply, did the Second Circuit run afoul of *Storer* in holding that voters and candidates are entitled to a "realistic opportunity to participate" in the party's nomination process as measured by whether a "challenger candidate" could compete effectively against the party-backed candidate?

QUESTIONS PRESENTED – Continued

3. In *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) and *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*) the Fourth and D.C. Circuits applied a rational basis balancing test to weigh the co-equal, but competing First Amendment rights of political parties in setting delegate selection rules against those of voters and candidates. Did the Second Circuit err in preferring the First Amendment rights of voters and candidates by first determining that New York's convention system severely burdened those rights and then subjecting the party's rights to strict scrutiny review?

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections, the New York County Democratic Committee, the New York Republican State Committee, the Associations of New York State Supreme Court Justices in the City and State of New York, Justice David Demarest, individually, and as President of the State Association, and Eliot Spitzer, Attorney General of the State of New York.

Respondents are Margarita López Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Lili Ann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

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The opinion of the United States Court of Appeals for the Second Circuit, App. 1-92, is reported at 462 F.3d 161 (2d Cir. 2006).

The opinion of the United States District Court for the Eastern District of New York, App. 93-191, is reported at 411 F. Supp. 2d 212 (E.D.N.Y. 2006).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV to the Constitution of the United States

§ 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Election Law

§ 6-106: Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

§ 6-124: A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate; substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

STATEMENT OF THE CASE

This case involves the constitutionality of the method of selection for all trial court judges of general jurisdiction throughout New York State. The lower courts declared

unconstitutional on First Amendment grounds New York's 85 year-old statutory scheme used to nominate major party candidates, known as the judicial convention system, and mandated that this election method be replaced by direct primaries – the precise system which New York's legislature specifically rejected in 1921.

Not only does this case directly impact the dispensation of justice to all New Yorkers, but the faulty legal principles on which the Second Circuit's decision rests pose a threat to the process by which political parties select their candidates nationwide and to basic principles of representative democracy. The Second Circuit assessed New York's judicial convention system by whether rank-and-file voters and so-called challenger candidates are afforded a "realistic opportunity to participate" – an amorphous standard that can only be measured by the outcome of elections. Petition Appendix at 41 (hereinafter, "App. ___."). The core thesis of the Second Circuit's opinion was that party leaders in New York have too much influence over the selection of judicial candidates and that "challenger candidates," vaguely defined as those who "lack[ ] the party machinery," (App. 59), cannot effectively compete with the party's favored candidates, thereby depriving voters of their purported First Amendment right to choose the nominee.

Yet, when considered from the proper perspective of each participant's designated role in the process, rather than the Second Circuit's skewed challenger candidate view, all of the various participants have access to the system and the burdens on the right to vote are slight. *See Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (state "must accord the participants in that process . . . the First Amendment rights that attach to their roles"). Voters have the unfettered right to vote for delegates of their choosing who share their interests and values and who will advance them in the convention process. Elected delegates, in turn, have the right to select judicial candidates of their choosing. An individual voters' opportunity to cast a ballot for his preferred delegate fully

vindicates that voter's First Amendment rights irrespective of whether there is any realistic chance that the delegate himself will be elected, let alone have his preferred judicial candidate nominated at the convention. *See Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

The danger of the Second Circuit's unbounded inquiry into party politics is manifest: it invites judicial review of potentially every contest for a party's nomination whether by convention or primary. Wherever party leaders are dominant, disfavored candidates within the party or anyone else seeking to challenge party rule can invoke the First Amendment as a blunt instrument to aid their cause. *See* App. 30 ("it is not the decision of the voters . . . but the relative strength of political parties . . . [that] determines the outcome of these elections"). The inevitable result is "splintered parties and unrestrained factionalism," precisely what the drafters of the Constitution warned against. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 368 (1997) (citing Federalist No. 10 (Madison) and quoting *Storer*, 415 U.S. at 736). More fundamentally, by determining that the First Amendment requires that candidates have a right to appeal directly to rank and file members rather than to locally elected delegates, and by fashioning a broad remedy that was not tailored to address the purported constitutional deficiency, the Second Circuit effectively banned political conventions as a candidate selection device, leaving direct primaries as the only constitutionally permissible method.

The Court should grant *certiorari* to resolve the conflict between the Second Circuit's decision and *American Party of Texas v. White*, *Storer v. Brown* and other decisions of this Court, which uphold the constitutionality of party conventions and appropriately confine the scope of ballot access rights to ensuring that state election regulations are non-discriminatory and do not freeze out minor parties and independent candidates. The Court should also grant *certiorari* to resolve the conflict between the Second Circuit's decision and those of the D.C. Circuit in *Ripon* and the Fourth Circuit in *Bachur* with respect to

the First Amendment rights of political parties and the appropriate balancing test to be applied where the rights of parties conflict with those of voters and candidates.

A. Procedural History

Plaintiffs, individual voters and would-be judicial candidates, brought this action on March 14, 2004, against the New York State Board of Elections (the "Board of Elections") for declaratory and injunctive relief challenging the constitutionality of New York's judicial convention system and seeking permanent injunctive relief installing a primary system in its place. App. 30-31. On June 9, 2004, Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the Board of Elections' enforcement of the three New York State Election Law statutes codifying the convention system, N.Y. Elec. L. §§ 6-106, 6-124 and 6-158, on grounds that they deny citizens and candidates equal protection under the law, and violate the First and Fourteenth Amendments by imposing undue burdens on candidates seeking a political party's nomination for State Supreme Court Justice. *See* App. 31.

The Attorney General of the State of New York appeared as statutory intervenor in defense of the challenged statutory provisions. As parties directly affected by the action, the following intervened as Defendants: the New York County Democratic Committee, the New York Republican State Committee, the Association of Supreme Court Justices of the State of New York, the Association of Supreme Court Justices of the City of New York, and Justice David Demarest, individually, and as President of the State Association. App. 31.

On January 26, 2006, the United States District Court for the Eastern District of New York issued its decision declaring the convention system unconstitutional and ordering that primary elections be held for major party candidates until the Legislature adopts a new statutory scheme. App. 31, 95-96. In doing so, the district court dismantled a carefully-crafted electoral system that has operated effectively to select a highly regarded judiciary

since it was enacted 85 years ago. It did not attempt to preserve the convention system that New York's legislature chose by attempting to cure the perceived constitutional defects, but instead issued a sweeping ruling that substituted primaries for conventions. *Cf. Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961, 968 (2006)

On August 30, 2006, the Second Circuit issued an opinion affirming the district court's decision in its entirety, holding that the district court properly determined that Plaintiffs were likely to succeed on the merits of their constitutional challenge, and its issuance of a mandatory injunction imposing an open primary was an appropriate remedy. App. 6.

B. New York's Legislature Adopted The Judicial Convention After A Failed Experiment With Primaries

1. Origins of the Judicial Convention

In 1846, New York amended its Constitution to provide for the popular election of Supreme Court Justices. App. 9. Without statutes providing otherwise, a party's judicial candidates for the State Supreme Court were chosen by the same method as other candidates for State office, which at the time, was by party convention. App. 9.

In 1911, during a nationwide wave of populism, the Legislature changed the law to provide for Supreme Court nominations by primary election – a then-relatively new mechanism for selecting candidates. App. 9. But over the next nine years, the primary system proved to be a poor means of selecting qualified individuals for the bench. Critics, including the press and leading bar associations, condemned the primary as burdensome and expensive, and warned that it facilitated the sale of judgeships to the highest bidder, thus threatening judicial independence. App. 9. Critics also disapproved of the primary system because the need to raise large sums of money enhanced the undue influence of political bosses over the nominating

process given their control over the party's large election apparatus. App. 9.

To eradicate these widespread concerns, the Legislature, in 1921, restored the convention system, which rested on familiar principles of representative democracy. App. 10. The convention system entrusted the nominating function to a body of locally-elected delegates, who, as representatives of the people and unpledged to any candidate, would gather at party conventions for each Judicial District to nominate the party's candidate who would appear on the general election ballot in November. App. 10.

2. Convention Mechanics

There are twelve Judicial Districts across the State from which candidates for Supreme Court Justices are nominated and elected. App. 11, 101. Each Judicial District is comprised of one or more counties. App. 86, 101. Delegates to the convention are elected at a party primary election held in September from smaller geographic areas within each Judicial District called Assembly Districts, the same political subdivisions from which New Yorkers elect their representatives to the State Assembly. App. 11, 101, 104. Although the number of delegates for each Assembly District is governed by each party's internal rules, the Election Law requires that the allotted number be substantially proportional to the percentage of total votes cast statewide for the party's gubernatorial candidate in the last general election. App. 11-12, 104-105.

Any enrolled member of a recognized political party residing within the Judicial District may run for delegate. The only requirement to get on a primary ballot for delegate is to gather 500 valid signatures from enrolled party members in the Assembly District within the petitioning period in the spring. App. 12, 108.

New York's judicial convention system is similar to the national party conventions that are used to select presidential candidates. The principal difference between the two is that delegates to the national conventions fill only

one position with one candidate, while New York's judicial delegates are generally called upon to fill multiple vacancies from an array of candidates. For that reason alone, judicial delegates are not intended to be pledged to any particular candidate. *See* App. 107.

Although the merits of the judicial nominating convention have been the subject of serious public debate through the years, New York's legislature has chosen to leave the system intact for 84 years. *See* App. 10. Indeed, at New York's constitutional convention in 1967, a proposal to replace the judicial convention with primaries was hotly debated, but ultimately rejected. Likewise, in 1973, the Joint Legislative Committee on Court Reorganization recommended that while judges on the Court of Appeals should be selected by gubernatorial appointment, the selection of trial court judges by judicial convention should remain in place. *See Report of the Joint Legislative Comm. On Court Reorganization*, Legis. Ref. 75-17210, Doc. No. 24, at 12 (1973). The Legislature heeded this recommendation.

C. Plaintiffs' Constitutional Challenge Rests On The Flawed Assumption That Challenger Candidates Have A Right To Appeal Directly To Voters And Circumvent The Party Structure

Plaintiffs allege that the convention system denies citizens the opportunity to vote for the candidates of their choice because the system poses insurmountable burdens to so-called "challenger candidates" – defined as those candidates lacking political party support. App. 156-158. In their view, the Constitution requires that these candidates have the right to circumvent the party structure and appeal directly to rank and file members to obtain the party's nomination.

To advance their case, Plaintiffs portray a system dominated by party bosses who purportedly handpick judicial delegates, control how they vote, and dictate the outcome of the convention. Under such a system, according to Plaintiffs, a challenger candidate who lacks the party's

imprimatur has no hope of success. App. 114, 131, 140, 158. Never mind that any party member can run for delegate, delegates are free to vote their consciences and challengers have the opportunity to lobby delegates for support. App. 69, 113-114. Never mind that candidates have alternative means to the general election ballot. App. 54, 160-161 (requiring only 3500 petition signatures to petition on to the ballot as an independent). Plaintiffs contend that to run a successful challenge against the party machinery, a challenger candidate must recruit and get elected sufficient judicial delegates pledged to her candidacy across the Judicial District to control the convention. Given the number of signatures necessary to petition delegate candidates onto a primary ballot, the geographical size of a Judicial District, the purported need to educate voters regarding which delegates are pledged to the candidate's candidacy, and the cost involved in such an endeavor, Plaintiffs claim that a challenger candidate is doomed to fail. App. 104-109, 158.

While Defendants hotly contest Plaintiffs' view of the judicial convention system and the trial record includes a great deal of contradictory evidence, such as the testimony of numerous sitting Justices across the State showing how they captured the nomination by successfully lobbying sufficient delegates to win the support of party leaders who did not initially back their candidacies, (App. 67-70, 122-125), these factual disputes are immaterial to this petition. At issue are starkly different views as to the nature and scope of the First Amendment rights that attach where a state prescribes that parties select their candidates through a delegate-based convention.

D. The District Court Finds The Judicial Convention System Unconstitutional Based On Its Concocted "Meaningful Participation" Standard And Installs A Primary In Its Place

Notwithstanding the wealth of evidence to the contrary, the district court held that New York State's convention system violates the First Amendment. It concluded that

major party leaders, not the delegates or voters, control who becomes a New York Supreme Court Justice. App. 95. In doing so, the district court adopted wholesale Plaintiffs' "challenger candidate" paradigm and crafted a constitutional right to "participate meaningfully" in the nomination process. App. 163. Reformulating the test in *Storer v. Brown* for independent candidates seeking access to the general election ballot, the district court asked:

> Could a reasonably diligent challenger candidate for Supreme Court Justice *succeed* in getting her own delegates and alternates on the ballot in each Assembly District? If not, could she *succeed* in lobbying the delegates installed by the party leaders?

App. 167 (emphases added) (citations omitted). Thus, the district court laid bare a constitutional analysis that ultimately turns on whether challenger candidates have a reasonable chance of *winning* their party's nomination.

As an interim remedy, the district court, rather than narrowly tailoring the relief in a way that would preserve as much of the Legislature's intent as possible, swept aside the judicial nominating convention, enjoining enforcement of N.Y. Elec. L. § 6-106 and use of the procedures set forth in N.Y. Elec. L. § 6-124. In its place, the district court ordered that nomination of Supreme Court Justices be made by primary election. App. 183-184.

Defendants filed a notice of appeal on February 7, 2006, and in light of the immediate impact that the district court's decision would have on incumbents running for re-election in November 2006, moved the district court for a stay pending appeal. The district court granted the stay motion on March 3, 2006, ordering that its decision would not take effect until after the 2006 general election. App. 33. On March 14, 2006, the United States Court of Appeal entered an order expediting the appeal. App. 33.

The district court's unprecedented decision not only received extensive news coverage and editorials in New York's major newspapers and daily law journal, but it immediately triggered a frenzy within the State bar. Public debate ensued over the appropriateness of the district court

decision, the impact on incumbents and the best method to select judges. Notably, less than one month after the district court's decision, the New York State Commission to Promote Public Confidence in Judicial Elections appointed by Chief Judge of the New York Court of Appeals Judith Kaye and chaired by John Feerick, former Dean of Fordham Law School (the "Feerick Commission"), issued its final report, concluding that conventions are preferable to primaries for nominating candidates for the office of Supreme Court Justice, and suggesting that the system be maintained with certain reforms adopted to improve it.[1]

E. The Second Circuit Affirms Based On A Slightly Refined, Although Equally Flawed, First Amendment Construct

The appeal to the Second Circuit attracted a great deal of interest. Some twenty organizations and individuals, including the State's and City's leading bar associations, civic groups and minority bar associations weighed in on various sides of the issues as *amici curiae* in the Second Circuit appeal. At the Second Circuit's specific request, the New York State Legislature filed an *amicus* brief in which it supported reversal of the district court's decision. On June 9, 2006, the Second Circuit panel heard over two hours of oral argument before a courtroom filled to capacity with state court judges, public officials, prominent members of the bar, and members of the press.

On August 30, 2006, the Second Circuit affirmed, holding that the district court (1) properly concluded that Plaintiffs demonstrated a clear likelihood of success on the merits of their First Amendment claim, (2) properly enjoined the judicial nominating convention, and (3) appropriately required that party nominations proceed via direct primary election until the Legislature enacts a new

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[1] *See* Report of the Commission to Promote Public Confidence in Judicial Elections ("Feerick Report") available at http://www.nycourts.gov/reports/JudicialElectionsReport.pdf.

nominating mechanism. In reaching its conclusion, the Second Circuit sought to improve on the district court decision where it fell short by articulating a more refined – although equally flawed – standard than the district court's "meaningful participation" test. *See* App. 41, 44.

The circuit court first determined that the First Amendment applies to the nominating phase (an issue never in dispute) and concluded that New York must afford "voters and candidates the right to associate through and in the judicial nominating process." App. 41. In expounding on the scope of this purported right, the circuit court held that candidates and voters alike must have "a *realistic opportunity* to participate in the nominating process." App. 41, 44 (emphasis added).

In measuring whether the convention system satisfies its amorphous "realistic opportunity" standard, the Second Circuit followed the Plaintiffs and the district court in adopting the perspective of a "challenger candidate," defined as "a reasonably diligent candidate who, although possessing public support, lacks the resources provided by a supportive political party and has no other means of overcoming the burdens that the system imposes." App. 60. The Second Circuit claimed to find support for the "challenger candidate" paradigm in this Court's decision in *Storer v. Brown*, where the relevant inquiry was whether "a reasonably diligent *independent* candidate [can] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot." App. 60 (emphasis added). However, the *Storer* strand of ballot access cases was concerned with laws that "freeze out" minor parties and independent candidates. They did not address intraparty contests at all. Accordingly, the Second Circuit's ruling rests on the unexamined assumption that the *Storer* standard can be applied to internal conflicts within a party. *See* App. 41-44.

In applying the *Storer* test to the context of intraparty competition, the circuit court determined that the burdens imposed by the convention system were severe. The court supported this conclusion based on the district court's

finding that, under New York's delegate-based convention system, the possibility of successfully lobbying party-backed delegates is "non-existent" and challenger candidates can never satisfy the signature requirements for running their own pledged delegates. However, successful lobbying of delegates amounts to winning the nomination, and running delegates pledged to specific candidates is the functional equivalent of a primary. Thus, the Second Circuit fundamentally changed the meaning of *Storer* by equating the right to access the general election ballot in *Storer* with either the right to win a party nomination or the right to have direct access to voters. But this Court has never found either such right to exist.

On the basis of this flawed standard, the Second Circuit agreed with the district court that New York's convention system is a boss-dominated process inaccessible to rank-and-file voters and challenger candidates, and went further by holding that voters' and candidates' associational rights to participate in the process outweigh the associational rights of political parties to determine how to best select their standard bearers. App. 45-46, 49-53. Thus, while the Second Circuit paid lip-service to a political party's right to publicly endorse and support a candidate of its choosing, it is clear that it is the effect of such support on the convention process that the circuit court found constitutionally offensive. App. 53-54.

The Second Circuit's decision will significantly affect all incumbent Supreme Court Justices across the State, many of whom face re-election in 2007. Having served on the bench for 14-year terms, these trial court judges are suddenly faced with the daunting task of re-entering politics. To compete effectively in primaries they will be under pressure to solicit funds from lawyers that may appear before them or even to render politically popular decisions. Even with respect to vacant seats, open primaries would threaten the integrity and judicial independence of New York's Supreme Court bench by ushering a new era of big money politics into the judicial selection process.

A definitive ruling by the Court clarifying the constitutional rights that apply to New York's judicial nominating

convention would thus serve a compelling public interest in New York and because such a ruling would almost certainly address party conventions or other nominating systems more generally, it would provide an important opportunity for this Court to develop its First Amendment jurisprudence.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULING IN *AMERICAN PARTY OF TEXAS V. WHITE*, WHICH EMBRACES CONVENTIONS AS A CONSTITUTIONAL ALTERNATIVE TO DIRECT PRIMARIES FOR SELECTING CANDIDATES

The Court should grant *certiorari* to resolve the clash between the Second Circuit's decision, which mandates a primary in lieu of party convention for the nomination of candidates for New York state trial judge, and the Court's decision in *American Party of Texas v. White* which holds that it is "too plain for argument" that the state may require intraparty competition to be resolved either by convention *or* primary. 415 U.S. at 781. The Second Circuit's overly expansive view of the First Amendment as affording "voters and candidates the right to associate through and in the judicial nominating process," (App. 41), effectively requires that rank and file voters have a direct vote in the selection of a party's nominee. This erroneous view dictates the equally erroneous result that forms of representative democracy, like the delegate-based convention at issue here, cannot pass constitutional muster because they do not involve direct appeal to voters. If permitted to stand, the Second Circuit's ruling would eviscerate this Court's holding in *White* by requiring as a practical matter that all nominations proceed by primary.

In *White*, the Supreme Court rejected a challenge to a Texas ballot qualification system under which the major political parties were required to nominate candidates by primary elections, smaller parties could use either primaries or nominating conventions, and new and even smaller

parties had to use precinct nominating conventions. 415 U.S. 767. Justice White, writing for seven other Justices, stated: "[i]t is too plain for argument . . . that the State may [properly] limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." *Id.* at 781 (citing *Storer v. Brown*, 415 U.S. at 733-736) (emphasis added); *Trinsey v. Commonwealth of Pa.*, 941 F.2d 224, 234 (3d Cir. 1991) (according to "available precedent . . . the Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states") (quoting *White*, 415 U.S. at 781). *White's* ruling that a convention is a constitutional alternative to a primary would be rendered meaningless if a convention must be the functional equivalent of a primary.

Confronted with *White*, the Second Circuit ostensibly acknowledges, as it must, that a convention system is, at least, "in the abstract, a perfectly acceptable method of nomination." App. 46. But the Second Circuit then proceeds to evade entirely the relevant issue by focusing on a straw man argument, namely Petitioners' purported claim that "all such [convention] systems, regardless of how they are implemented, are constitutional." App. 46. Petitioners have never claimed that conventions are *per se* constitutional. While the Second Circuit may be right that "*White* gave no categorical blessing to nomination conventions generally, or to the unique hybrid scheme at issue here," (App. 47), it simply cannot be the case that *none* of them is constitutional.

But no true convention system could be constitutional under the Second Circuit's extreme view of the First Amendment for the very reason that it places delegates between voters and candidates. The Second Circuit's theory is that New York "must afford voters and candidates the right to associate through and in the judicial nominating process" and that "the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." App. 41, 44. *See also* App. 166 (as the district court put it, "more open and

effective participation by voters must be allowed at the nomination stage, and candidates must be permitted an effective means of appealing to the voters when it counts."). Thus, the practices which the lower courts held to be a severe burden on voters' rights to vote and associate were simply the "network of facially innocent provisions" (App. 44) which comprise a convention system where delegates elected to serve as party representatives, not rank and file party members, choose candidates. But the First Amendment rights of individual voters are fully secured when they are given the opportunity to vote for delegates of their choice and there is no constitutional right to a direct plebiscite in the selection of candidates. *See Cousins v. Wigoda*, 419 U.S. 477, 489 (1975) ("respondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention.").

It is telling that neither the Second Circuit nor the district court was able to describe a true convention system that would pass muster under their constitutional analysis. Plaintiffs likewise identify only conventions that were the functional equivalent of primaries, such as conventions open to all enrolled party members or where pledged delegates on the primary ballot simply serve as proxies for the candidates. Thus, under the Second Circuit's construct, only direct primaries or their equivalent would survive scrutiny.

If some form of a true delegate convention must be constitutionally permissible, as *White* requires, then the lower courts should not have completely dismantled New York's chosen election method and replaced it with a primary. Instead, consistent with this Courts' directive in *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006), the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent. "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature." *Id.* at 968 (citations omitted). Rather than

disregard the legislature's express intent to *avoid* primaries, the lower courts should have tailored the remedy to address the conventions' purportedly offending features, while still preserving the convention system itself. Several remedial options exist that would have done far less violence to the Legislature's choice than the remedy ordered by the district court. Among other things, the court could have considered: (1) reducing the number of petition signatures required; (2) decreasing the number of delegates; (3) extending the time period before the convention to give more time for candidates to lobby and delegates to deliberate; and (4) ordering the political parties to address the convention. Feerick Report at 30-36. But the Second Circuit chose to thwart the Legislature's choice, upholding the invalidation of the convention system and its replacement with a primary. In imposing this remedy, the Second Circuit made plain that it would consider nothing short of the installation of a direct primary to be constitutional, in direct conflict with this Court's decision in *White*.

II. THE COURT SHOULD GRANT THE PETITION TO SETTLE THE APPROPRIATE SCOPE OF VOTERS' FIRST AMENDMENT RIGHTS IN A PARTY NOMINATING CONVENTION AND TO RESOLVE THE CONFLICT WITH *STORER V. BROWN*, WHICH MERELY ENSURES BALLOT ACCESS, NOT ELECTORAL VICTORY

This case raises a fundamental constitutional issue of national importance: what are the First Amendment rights of voters and candidates within the arena of intraparty competition, and specifically what are those rights where the State has chosen party convention as the nominating process? In answering that question, the Second Circuit intruded in unprecedented fashion upon the prerogative of parties to choose their candidates. And, its analysis was flawed from the outset in that it injects this Court's standard designed to measure ballot access for minor party and independent candidates at the *general*

election phase to an entirely different electoral process at an entirely different phase of the election.

The *Storer v. Brown* strand of ballot access cases is concerned with laws that "freeze out" minor parties and independent candidates from gaining access to the general election ballot and thereby grant the two major parties an effective monopoly on political participation. The Second Circuit's ruling rests on the assumption that *Storer's* "reasonably diligent *independent* candidate" standard applies to an internal conflict within a party – an entirely different context where there is no concern that different political viewpoints will be silenced. *See* App. 41-44 (emphasis added). Arguably, the most that can be said about the *Storer* line of cases is that a *party or an independent candidate* has a right to access the ballot, not that any *particular candidate within a party* has such a right. Consequently, it is unclear whether these "freeze out" decisions even apply to the scope of First Amendment rights within *intraparty* competition. If not, the fundamental constitutional issue presented by this petition – the First Amendment standard governing intraparty contests – would remain an open question awaiting this Court's needed resolution. Thus, the Court should grant *certiorari* to determine whether *Storer v. Brown* even applies to the instant case.

Alternatively, if *Storer* does apply in the intraparty context, the Court should grant *certiorari* because the Second Circuit's decision actually conflicts with *Storer*, as well as other decisions of this Court. All *Storer* establishes is the right of independent candidates to petition onto the general election ballot, but it does nothing to improve their long odds of winning against established party candidates. Petitioners submit that the equivalent of ballot access in this case is convention access, *i.e.*, the right to have a candidate's name put up for consideration by the delegates. *Storer* cannot be translated, as the Second Circuit would have it, into entitling candidates to "reasonable participation" in the nomination phase, which the Second Circuit insists must be either direct, unmediated access to rank-and-file party members or a reasonable chance of

convincing elected delegates to award them the nomination. Thus, to the extent *Storer* does apply, granting this petition would allow this Court to resolve the conflict over the appropriate application of *Storer* in the intraparty arena.

A. This Court Should Resolve Whether The Scope Of First Amendment Rights In *Intraparty* Competition Is Governed By Its Existing Ballot Access Jurisprudence

This petition should be granted to settle the scope of the First Amendment rights of voters and candidates at the nomination phase, particularly within the context of a true delegate-based convention system. This Court has not settled that question in its long line of ballot access decisions and, certainly, has never applied the *Storer* test to intraparty competition.

As an initial matter, the Second Circuit's claim that its "realistic opportunity to participate" standard is "derive[d] directly" from this Court's "freeze out" line of ballot access cases in *Williams v. Rhodes*, 393 U.S. 23 (1968), *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Jenness v. Forston*, 403 U.S. 431 (1971) does not survive examination.[2] App. 41-44. *Rhodes*, *Celebrezze* and *Jenness* all

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[2] The Second Circuit, like Plaintiffs and the district court, also cites to *Bullock v. Carter*, 405 U.S. 134 (1972) to support its "realistic opportunity to participate" standard. *See* App. 42-43. But *Bullock*, which is part of a different strand of the Court's ballot access jurisprudence that involves invidious discrimination, is irrelevant for purposes of determining the scope of the First Amendment right at issue here. *Bullock*, like *U.S. v. Classic*, 313 U.S. 299 (1941) and *Terry v. Adams*, 345 U.S. 461 (1953), merely establishes a proposition that is not in dispute here: the state action requirement for triggering constitutional protection against invidious discrimination is satisfied at the nominating phase. Unlike *Bullock*, which involved exclusionary filing fees, or *Classic*, which involved ballot tampering, or *Terry* which involved racial discrimination – all of which were decided on Fourteenth Amendment or even Fifteenth Amendment grounds – this case involves none of these invidious practices and raises only voting and associational rights under the First Amendment. Of course, if the challenged provisions were discriminatory, such as in the notorious "white primary" cases

(Continued on following page)

involved interparty competition and addressed the issue of whether the election schemes at issue were designed to "freeze out" minor party candidates and non-party, independent candidates from the political process by effectively denying them general election ballot access. Those cases merely hold that election schemes that exclude minor parties or independent candidates from the political process are unconstitutional and thus they have no application to the present controversy. *See Rhodes*, 393 U.S. at 30 (acknowledging a party's fundamental First Amendment rights, the Supreme Court concluded that "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot"); *Celebrezze*, 460 U.S. at 787, 793 (reiterating fundamental principle of *Rhodes* that "[t]he right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot,'" (citations omitted), and concluding that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment"); *Jenness*, 403 U.S. at 439 (distinguishing *Rhodes*, in part, because challenged statute "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life").

Far from articulating a different standard, *Storer v. Brown* is just another variation of a *Rhodes* "freeze out" case. Indeed, the *Storer* test was actually designed to assess effective exclusions of minor party and non-party candidates that freeze the status quo. In *Storer*, the

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(*e.g.*, *Terry*) or the exclusionary filing fees struck down in *Bullock* and *Lubin v. Panish*, 415 U.S. 709 (1974), they would be unconstitutional under the equal protection clause.

Supreme Court was asked to determine the constitutionality of, among other statutes, a provision that required independent candidates to collect signatures from 5 percent of the total votes cast in California at the last general election within a 24-day period. *Id.* at 738-740. In that context, the Court posed this question: "could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it only be rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.* at 742. Specifically, the Court emphasized that "to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties." *Id.* at 746.

Thus, this Court's long line of "freeze out" decisions sheds no light on the constitutionality of election systems governing party nominations, as intraparty competition does not implicate the danger of "confer[ing] an effective political monopoly on the two major parties." *Storer*, 415 U.S. at 729. *See also Anderson*, 460 U.S. at 794 ("[i]n short, the primary values protected by the First Amendment ... are served when election campaigns are not monopolized by the existing political parties"). This petition, therefore, should be granted to resolve, as a threshold matter, whether the *Rhodes* and *Storer* line of "freeze out" cases even applies to determine the scope of First Amendment rights at the nomination phase. To the extent such decisions do not apply here, then this petition would provide this Court with the opportunity to articulate the scope of that fundamental First Amendment right.

B. If This Court's *Storer* Line Of Ballot Access Decisions Does Apply To The Scope Of Voters' First Amendment Rights In *Intraparty* Competition, The Second Circuit Departs From This Court's Jurisprudence In Reformulating The *Storer* Test

To the extent that the *Storer* line of cases applies to the nomination phase, this petition would present this

Court with the opportunity to resolve the conflict over the application of the *Storer* test to intraparty competition. The Second Circuit erroneously equated the right to *access* the general election ballot in *Storer* with either the right to win a party nomination outright or the right to have direct unmediated access to voters. But this Court has never found either such right to exist. For these two independent reasons, the Second Circuit's decision fundamentally collides with this Court's *Storer* decision and the rest of its ballot access jurisprudence.

Going well beyond *Storer*, the Second Circuit agreed with the District Court's conclusion that the burdens imposed by the convention were severe because the possibility of lobbying party-backed delegates is "non-existent" and "challenger candidates" can "never" satisfy the signature requirements for running their own pledged delegates. *See* App. 45. But the equivalent of ballot position cannot be (1) successfully lobbying the chosen delegates or (2) satisfying the signature requirements for running one's own slate of pledged delegates throughout the district.

The first option – *successful* lobbying – amounts to winning the nomination, not merely competing for it. Even the Second Circuit implicitly acknowledges that a right to win standard would be constitutionally erroneous. *See* App. 45. Yet, the Second Circuit rests its decision on the district court's determination that it is practically impossible for disfavored candidates to lobby delegates because of the influence of party leaders. *See* App. 45-46. While petitioners dispute that premise, even assuming its validity, the fact that the Second Circuit relied upon convention *outcomes* in rendering its decision demonstrates just how far the lower court departed from established First Amendment law. Would the outcome have been different if party leaders were less influential or if delegates had maverick tendencies? Faithfully applying the same analytical approach to primaries would lead to a finding of unconstitutionality in most instances where as a practical matter party leader support dictates the outcome.

See App. 192-194 (observing that "election" of New York City Civil Court judges by primary is generally nothing more than appointment by powerful party leaders). It is an unalterable political reality in all systems that party leaders have enormous influence over the selection of candidates. The Constitution cannot be a guarantor of electoral success for disfavored party candidates and the Second Circuit's effort to make it one is a recipe for mischief.

The second option the Second Circuit identifies – running pledged delegates – is deeply problematic because it insists upon unmediated access between voters and candidates. From a Constitutional perspective, finding that candidates have a right to run pledged delegates amounts to a judicial declaration that the only nomination method that satisfies the First Amendment is a primary or its functional equivalent – a result antithetical to *White* and this nation's rich history of political conventions. *See supra* Section I. Moreover, such a requirement would defeat the intention of New York's legislature, which crafted a system where party representatives are delegated the authority to vote for *multiple* judicial candidates, not conscripted to vote for just one.

In bending the *Storer* test to fit the unintended context of intraparty competition, the Second Circuit would change the meaning of *Storer* entirely. At most, *Storer* stands for the proposition that reasonably diligent candidates should be given an opportunity to enter the race, not that the rules should be adjusted to improve their odds of winning. Here, where there is no candidate ballot at the nominating stage precisely because there is a convention system in lieu of a primary, the proper equivalent to ballot access is *convention access*, *i.e.*, having a chance to put one's name up for consideration at the convention. To the extent this Court's ballot access decisions, including *Rhodes*, *Storer* and *Lubin*, offer any insight into the constitutionality of the inner-workings of intraparty competition, the principle that they espouse is

merely the right to compete, not the right to win. In every one of those cases, the minor party or independent candidates were clamoring for a position on the general election ballot even though they had no realistic chance of winning the election. By excluding those candidates from the general election ballot, those candidates were denied any opportunity even to be *considered* for election to office. These cases do not remotely support the notion that "disfavored major-party candidates," (App. 60), have a constitutional right to appeal the determination of party representatives by going directly to rank and file members. Indeed, as this Court has recognized in *Clements v. Fashing*, there is no fundamental right to be a candidate in the first place. 457 U.S. 957, 963 (1982) ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny'") (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

To the extent this Court's ballot access cases apply to intraparty competition, this Court should grant *certiorari* to settle the appropriate application of the *Storer* test for purposes of determining the scope of the First Amendment right due to voters and candidates in the nomination process.

III. THE SECOND CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH TWO OTHER CIRCUITS OVER THE APPROPRIATE CONSTITUTIONAL STANDARD FOR REVIEWING POLITICAL PARTY RULES GOVERNING THE SELECTION OF CONVENTION DELEGATES

This Court should grant *certiorari* to resolve the split between the Second Circuit, on the one hand, and the D.C. Circuit and the Fourth Circuit, on the other hand, concerning the proper constitutional test for reviewing the constitutionality of party rules governing the selection of judicial convention delegates. In *Ripon* and *Bachur*, the D.C. and Fourth Circuits weighed the competing First Amendment rights of political parties versus those of voters and candidates. *Both* decisions were based upon a

critical jurisprudential principle, namely, that the competing First Amendment rights of voters and political parties are each deserving of the same heightened level of constitutional protection. *Both* cases ultimately employed a rational basis balancing test for determining the constitutionality of the challenged rule. By contrast, the Second Circuit elevated the First Amendment rights of voters above that of political parties, and, instead of balancing these competing rights, evaluated the burdens imposed on voters and candidates in isolation from the rights of political parties. Thus, as shown more fully below, there is a conflict between the Second Circuit and that of two other circuits concerning the appropriate test to apply in evaluating conflicting, but co-equal First Amendment rights.

In *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), registered Republicans in numerous states challenged the constitutionality of the delegate allocation formula adopted by the National Republican Party for its 1976 convention as violating the principle of "one-man, one-vote." *Id.* Although the court upheld the constitutionality of the formula primarily on equal protection grounds, the court also found that "[t]o the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did." *Id.* at 588. While the *Ripon* court acknowledged that the right to vote is implicated in the nomination process, it held the "view that, as between that right and the right of free political association, the latter is more in need of protection in this case . . . the right to organize a party in the way that will make it the most effective political organization seems clearly at stake here." *Id.* at 586. Ultimately, the court applied what was effectively a rational basis balancing test, as it concluded that there was no equal protection problem because "the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 586-587 (emphasis added).

The *Ripon* court's approach hinged on its guiding principle that competing First Amendment rights of voters

and political parties were each deserving of the same level of constitutional protection. In reasoning by analogy to this Court's decision in another context, the court determined that the rights of voters must not come at "the price of interference" with the rights of political parties. The court explained that where the "two conflicting constitutional rights" of voters and political parties are at stake, voting rights are not entitled to heightened protection by the state or government as they might otherwise be in the absence of the countervailing rights of political parties. *Id.* at 586 n. 61 (citations omitted). Balancing the party's First Amendment rights against the voters' rights, the circuit court upheld the constitutionality of the party's rule governing delegate selection as related to a rational purpose.

In another case applying *Ripon's* rational basis review to a First Amendment challenge to an intraparty contest, the D.C. Circuit held that the strict scrutiny test developed for access to the general election ballot in the *Storer* line of cases – the test applied by the Second Circuit in this case – does not apply when a putative candidate's or voter's First Amendment rights are pitted against a political party's First Amendment rights. *See LaRouche v. Fowler*, 152 F.3d 974, 994-995 (D.C. Cir. 1998). When asserted First Amendment interests conflict, applying rational basis review rather than strict scrutiny "best effectuates the Supreme Court's direction to approach judicial intervention in this area 'with great caution and restraint,' and to recognize 'the large public interest in allowing the political processes to function free from judicial supervision.'" *Id.* at 995-996 (quoting *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)). Indeed, in *LaRouche* the D.C. Circuit rejected a challenger candidate's First Amendment challenge even though the party completely excluded delegates supporting the candidate from the nominating convention. *Id.* at 996-998.

The *Ripon* court's balancing of the competing rights was also conducted from the perspective that the "internal workings of a political party" deserve the protection of the First Amendment absent invidious discrimination. *Id.* at 588. Indeed, the court recognized that "[t]here are a number of respects, then, in which the parties conduct

their affairs other than by giving equal attention to the preferences of all voters, or even all party adherents." *Id.* at 584 (footnote omitted). The court further noted that, in other Western democracies, "[t]he types of local leaders dominating the process vary from party to party and from locality to locality. . . . Candidate selection is not the business of the party rank and file. . . . Candidate selection is meant to be oligarchical." *Id.* at 585, n. 57 (citation and internal quotation marks omitted).

When the Fourth Circuit was presented with a situation involving the competing First Amendment rights of political parties and voters and candidates, it employed a similar balancing test to the one used in *Ripon*. In *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), the appellee challenged the constitutionality of his party's rule requiring him to allocate evenly on the basis of gender his votes for delegates to the party's closed national Presidential convention. In finding no violation of the appellee's First Amendment right to vote, the Fourth Circuit – as had the *Ripon* court – began with the rights of political parties as the starting point of its analysis, noting that it had been settled by the Supreme Court in *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975), that "a political party has a right of political association protected by the First and Fourteenth Amendments, and that right of association carries with it a right to determine the party's own criteria for selection of delegates to its national convention." *Bachur*, 836 F.2d at 841. Indeed, the court even recognized that in exercising its right to associate, a party could choose to adopt a closed, delegate-based convention system, as has New York's legislature, in which voters have "no direct voice" and their preference may only be "partially translated into the actual nomination" as "popular" support may not be "wholly determinative of the outcome":

> standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a

> . . . preference[,] and the selection of delegates[,] may be only partially translated into the actual nomination. A finding that . . . a right to participate in a popular primary election does not foreclose party limits on the effective weight of [that] participation, or mandate that the popular ballot is to be wholly determinative of the outcome of the nomination process. Indeed in many states, delegates to the national convention are selected by means other than a primary election, so that many . . . [voters] have no direct voice in the selection of delegates.

836 F.2d at 842 (emphasis added). Ultimately, the court concluded that "the limited restriction [placed] on Bachur's right to vote for delegates" did not unconstitutionally infringe upon his right to vote when "balanced" against the "broad, encompassing" First Amendment rights of parties. *Id.* at 842. Critical to its decision was the fact that the party rule at issue governing delegate selection "manifestly has a rational purpose," notably to promote female participation in party affairs. *Id.* at 842. In doing so, the Fourth Circuit recognized that the constitutionality of the representational scheme in *Ripon* was upheld because it "rationally advance[d] some legitimate interest of the party. . . . " *Id.* at 842 (citing and quoting *Ripon*, 525 F.2d at 586-587).

The Second Circuit adopted a fundamentally different approach than that of the D.C. Circuit and the Fourth Circuit. Instead of using a rational basis balancing test, the Second Circuit analyzed the burdens associated with the convention system by applying the *Anderson v. Celebrezze* test in a one-sided fashion without regard for a party's First Amendment right to choose its standard bearer. *See* App. 34-35, 45-46. The starting – and effectively ending – point for the Second Circuit's analysis was the purported burdens imposed on the First Amendment rights of voters and candidates. Only after determining that the burdens imposed on voters and candidates by the convention were "severe," did the Second Circuit ever even give a nod to the formidable constitutional rights of

parties. *See* App. 49-54. But, even then, the court's consideration of party rights was limited to applying strict scrutiny analysis, which requires that a challenged law be necessary to serve a compelling state interest. *See* App. 49-54, 70. While the Second Circuit claimed that it considered the First Amendment rights of political parties by balancing or weighing them directly against the rights of voters and candidates, (*see* App. 49-53), in reality, the Second Circuit merely paid lip service to party rights in analyzing whether they "justify New York's nominating scheme" under strict scrutiny analysis (*see* App. 49, 70). Within this context, the First Amendment rights of political parties were improperly subordinated to those of voters and candidates, notwithstanding the decisions in *Ripon* and *Bachur*.

Unsurprisingly, the convention system had no chance of ever surviving the Second Circuit's strict scrutiny analysis, and thus was struck down as unconstitutional. By contrast, the constitutionality of the convention system should have been upheld had the Second Circuit not favored the First Amendment rights of voters over those of political parties, and instead had followed the constitutional standard under *Ripon* and *Bachur*.

Thus, there exists a direct conflict between the Second Circuit's decision and that of two of its sister circuits over the appropriate constitutional standard or test to employ where a situation involves conflicting First Amendment rights. This petition should be granted so that this Court can resolve this split and its far reaching implications.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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